PP

v.

WILLIAM AYAU

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[CRIMINAL APPEAL NO: K42-21-2002]
14 APRIL 2005

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Appeal by prosecution against sentence of five years imprisonment for offence of rape - Whether sentence manifestly inadequate - Whether trial judge failed to apply correct principles of sentencing - Whether sentence ought to be increased*

This was an appeal by the prosecution against the decision of the learned sessions court judge ('the SCJ') sentencing the accused to five years imprisonment after he had pleaded guilty to a charge of rape under s. 376 of the Penal Code. The prosecution submitted that such a sentence was manifestly inadequate considering that the accused had raped his 13-year old niece. In meting out the five-year sentence, the SCJ had taken into consideration the guilty plea made by the respondent and the fact that the accused had just turned 19 at the time he committed the crime. The SCJ considered and followed the case of *Tukiran Taib v. PP ('Tukiran')* where the court took the view that offenders aged 17 to 21 years should be kept away from prison. Another matter that was considered by the SCJ was that the offence was "stale" *ie*, that the offence "was committed in 1998 but the accused was not charged until the end of 2001". The SCJ was of the view that the waiting period may be considered during sentencing. Thus, it fell to this court to decide whether the decision of the SCJ was right and just.

Held (allowing the appeal):

[1] On the facts, the instant case differed substantially with *Tukiran* and at least three significant distinctions could be observed: (i) whilst the accused in *Tukiran* was found guilty of stealing 176 coconuts, the present case related to the commission of the rape of a 13-year old schoolgirl, who happened to be the accused's own niece, an offence of a much more serious nature; (ii) *Tukiran* was decided in 1955 where the age of majority was 21 years, but following the Age of Majority Act 1971, the accused

was no longer a minor at the time of the commission of the crime and was worthy of punishment as an adult; and (iii) whilst the accused in *Tukiran* was a first-time offender, the accused in the present case had previously been charged under ss. 379, 411, 454 and 457 of the Penal Code. In the circumstances, *Tukiran* was hardly applicable. (pp 293 g-h & 294 a, e, h)

[2] Since this case involved the rape of an underage girl, the question of the offence being "stale" should not have arisen at all; furthermore, the accused was not charged in court because the facts showed that he had been at the Henry Gurney School at that time. It was clear that the SCJ had erred by not applying the correct principles of sentencing in this case as a five-year sentence would not be appropriate, taking into account the considerations of public interest coupled with the need to reflect the gravity of the crime. With regard to the antecedents of the accused and taking into account, in totality, his plea of guilt and his age, it was the considered view of this court that the sentence of the SCJ ought to be substituted with a sentence of 15 years imprisonment and five strokes of the "rotan". (pp 295 c-d, 296 e-h & 297 a-b)

[Order accordingly.]

Case(s) referred to:
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(foll)***
Bhanudulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mark Koding [1983] 1 MLJ 111 ***(dist)***
R v. Kenneth John Ball [1951] 35 Cr Appellant R 164 ***(foll)***
Rex v. Grondkowski [1946] 1 All ER 560 ***(foll)***
Tukiran Taib v. PP [1955] MLJ 24 ***(dist)***

Legislation referred to:
Child Act 2001, s. 76
Penal Code, ss. 376, 379, 411, 454, 457

Other source(s) referred to:
Roosniza Mohd Shariff, *Penalties and Attitudes in Preventing Rape*, Malayan Law Journal [2005] 1 MLJ lvii

For the appellant - Wan Abdul Razak DPP
For the respondent - William Ayau

Reported by Suresh Nathan

JUDGMENT

Sulong Matjeraie J:

This is an appeal by the prosecution against the sentence of five years imposed on the accused/respondent (hereinafter referred to as 'the accused') after he pleaded guilty to a charge under s. 376 of the Penal Code for rape. The prosecution submits that such a sentence was manifestly inadequate.

Facts Of The Case

According to the agreed facts of the case, the accused raped his niece at 9.30am on 11 January 1999. His niece was only 13 years 7 months old at the time of the commission of the crime. She was raped by the accused in the house of the complainant, the mother of the victim and who is also the elder sister of the accused. The complainant was then washing her clothes at a nearby river.

On the fateful day, when the accused came back from work he found that only the victim was in the house. She was then at the guests' area of the house. The accused got hold of her. He started to grope and fondle her breasts and lifted her up and brought her to her brother's bedroom. He put her down on her brother's bed. The victim tried to put up a fight but failed and was warned by the accused not to make any noise. The accused took off her pants and her underwear and placed the victim in a prostrate position and penetrated her from behind. He however stopped when the victim screamed in pain.

As a result, the vagina of the victim was bleeding ceaselessly. She was sent to the Queen Elizabeth Hospital for examination. It was confirmed by the Hospital's Obstetric and Gynaecology Consultant that there were "fresh tear of the hymen at 5 and 7 o'clock with a haematoma at 5 o'clock position" and her "posterior fourchette was torn" as well.

A probation report of the accused prepared by the Probation Officer on 28 January 2002 *inter alia*, revealed as follows:

(a) at the time the report was made, the accused was staying with his parents together with his wife and an infant daughter. They lived in a wooden kampong house with basic amenities like electricity and water;.

(b) This offence of 'rape' was the third offence committed by the accused. The other offences for which he was convicted were:

(i) On 8 October 1997 he was charged under s. 379 of the Penal Code, under case No. 83-334-97 and was released on a bond of good behaviour for one year in the sum of RM1,000 in one local surety;

(ii) On 5 May 2000 the accused was charged in cases No. 83-330-2000, 83-331-2000 and 83-332-2000 under s. 411 Penal Code (Dishonestly receiving stolen property), ss. 454 and 457 of the Penal Code (Housebreaking). The Magistrate Court ordered that he be sent to Henry Gurney School until he reaches the age of 21.

These offences, including the charge for rape, were committed by the accused when he was 19 years of age after he was released on a bond of good behaviour but before he was sent to Henry Gurney School. He was only released from the said Henry Gurney School on 19 February 2001.

Decision Of The Learned Sessions Court Judge

It is observed that the learned Sessions Court Judge, in her judgment, noted that the respondent has reformed after his release from Henry Gurney School and took his responsibility as a husband and father seriously and has not committed any offence since then. He no longer smokes, drinks or takes drugs or cough mixtures. He asked for leniency and a chance to start afresh with his wife and child for he truly regrets his past actions.

In meting out the five year sentence the learned judge took into consideration the guilty plea made by respondent, the clean record after his release from Henry Gurney School and that the accused had just turned 19 at the time he committed the crime. The learned Sessions Court Judge considered and followed the case of *Tukiran bin Taib v. PP* [1955] MLJ 24 (hereinafter referred to as 'the *Tukiran* case') where the court took the view that offenders aged 17 to 21 years should be kept away from prison. Further, she was also of the view that the accused should have been given the benefit of having his plea on this rape case being taken at around the time when he committed the other offences. The learned judge lamented that the accused could have been sentenced justly for the totality of his crime.

Another matter that was considered by the learned judge was that the offence was "stale". The offence "was committed in 1998 but the accused was not charged until the end of 2001". It was the view of the learned judge that "the waiting period may be considered during sentencing"; see *PP v. Mark Koding* [1983] 1 MLJ 111. Quoting Hilbery J in *R v. Ball* she opined that "the public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living."

While appreciating the seriousness of the offence, the learned Sessions Court Judge was of the view that the rehabilitative aim of sentencing as opposed to the retributive or the deterrent aim would best serve the public interest in this case. In the circumstances, it was the considered view of the learned Sessions Court Judge that the sentence of five years imprisonment of the accused for the offence of rape is right and just.

General Principles

It is an established practice that the High Court will not alter a sentence imposed by the lower or subordinate court merely because it might have passed a different sentence. In the exercise of its revisionary powers, the High Court may do so if it is satisfied that the sentence imposed is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles of assessment of the sentence; see *PP v. Loo Choon Fatt* [1976] 2 MLJ 256. Hashim Yeop Sani J (as he then was) remarked at p. 258B in the said case that the correct approach is to 'strike a balance, as far as possible, between the interests of the public and the interests of the accused.'

Although the spirit and principle in the *Tukiran* case, which was considered and adopted by the learned Sessions Court Judge, is still preserved as reflected in s. 76 of the Child Act 2001 (Act 611), I am of the humble view that this instant case differs substantially with the *Tukiran* case. At least three significant distinctions could be observed.

Firstly, whilst the accused in the *Tukiran* case was found guilty of stealing 176 coconuts, an offence, in my view of a less serious nature, this instant case relates to the commission of a heinous and despicable crime of rape. On top of that it is a rape of a school girl of 13 years 7 months old. What is more appalling is that it was also an incestuous relationship, the victim being

his own niece. It is unfortunate that although the seriousness of the offence was appreciated by the learned Sessions Court Judge, the sentence of imprisonment of five years does not reflect society's abhorrence but would instead deprecate the seriousness of the crime.

There had been an especially dramatic rise in reported rape cases in the country. In a paper entitled *"Penalties and Attitudes in Preventing Rape"* by Puan Roosniza Mohd Shariff reported in the Malayan Law Journal [2005] 1 MLJ lvii, @ p. lix, it was reported that "according to the Rape Report on Malaysia, in 1993 there were 879 such cases, or 2.4 cases per day. This increased to 1,539 in 1998, or 4.2 cases per day. In 2002, statistics from the Royal Police Department showed that 1418 rape cases were reported. By age, more than half (55.8%) of the victims were under 16 years of age". "This translated into a daily frequency of 3.31 cases in 2000, 3.70 in 2001, 3.92 in 2002 and 4.05 cases in 2003." The report further adds that "if studies that claimed that only one out of ten rape cases are reported is something to go by, then one can imagine the actual number of rapes that occur in the country in a single day." (*ibid* at p. lxii).

Secondly, the *Tukiran* case was decided in 1955 where the age of majority was 21 years, but following the Age of Majority Act 1971 (Act 21), the accused, who was above the age of 18 at the time of the commission of the crime, was no longer a minor. He was an adult as under the Child Act 2001 only a person under the age of 18 years is considered as a child. He knew what he had done and must be made responsible for his action. Clearly the accused is worthy of punishment as an adult not only because he has betrayed the trust of his own sister but he should realize the trauma inflicted on the victim is unfathomable. This tragedy, horror, suffering endured by the victim, the embarrassment felt not only by her but her family as well, failed to be considered in the judgment of the learned Sessions Court Judge. In the circumstances a five-year imprisonment sentence handed down is misplaced leniency.

Thirdly, while recognizing that Tukiran bin Taib was a first offender, the learned Bellamy J said: "It has been stressed by this court that it is very desirable that young offenders, that is offenders between the ages of 17 and 21 years, **who are also first offenders,** should be kept out of prison, **if possible**." (emphasis added). On the other hand, the accused in this instant case had previously been charged under ss. 379, 411, 454 and 457 of the Penal Code. In the circumstances, the *Tukiran* case is hardly applicable here.

The Offence Was 'Stale'

The learned Sessions Court Judge viewed that the offence was 'stale' in that the offence "was committed in 1998 *(sic)* but the accused was not charged till the end of 2001." Quoting the case of *PP v. Mark Koding* [1983] 1 MLJ 111, it was the view of the learned judge that "the waiting period may be considered during sentencing."

It is to be noted that unlike this instant case, *PP v. Mark Koding* relates to a charge for uttering seditious words in the Dewan Rakyat, an offence under the Sedition Act. I am of the view that since this instant case involves the rape of an underage girl; the question of the offence being 'stale' should not arise at all. As mentioned earlier, the offence of rape was committed by the accused on 12 January 1999 and he was charged on 31 December 2001. There is, I believe, an explanation here as the accused was sent to Henry Gurney School on 5 May 2000 and was only released on 19 February 2001. For obvious reason he was not charged in court while he was still at the Henry Gurney School.

Credit Given In A Case Where A Person Pleads Guilty

It would appear that the learned Sessions Court Judge gave credit to the accused in view of his guilty plea. Although it is generally accepted that a normal reduction of the sentence is between one fourth to one third of what would otherwise have been imposed; see *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209, this is not a strict rule as the court may refuse to grant any discount. It is to be observed that where public interest demands a deterrent sentence, the guilty plea will not automatically entitle an accused to a lesser punishment; per Augustine Paul, JCA, in *Bachik bin Abdul Rahman v. Public Prosecutor* [2004] 2 CLJ 572. I am of the view that the discount given by the learned Sessions Court Judge runs contrary to the above mentioned authorities. One of the reasons given for the petition of appeal was that the learned Sessions Court Judge appears to be over sympathetic to the mitigation plea of the accused. I am more inclined to agree with that submission and would wish to quote what Lord Goddard said in *Rex v. Grondkowski* [1946] 1 All ER 560, 561: "The judge must consider the interests of justice as well as the interests of the prisoners. It is too often thought, or seems to be thought, that the interest of justice means only the interests of the prisoners." To this, I would add what Hilbery J said in the celebrated case of *R v. Kenneth John Ball* [1951] 35 Cr.

Appellant. R 164, 165: Before passing sentence it is necessary that the "court hears evidence of the antecedents and character of every convicted person". A court should always be guided by certain considerations in deciding the appropriate sentence. "The first and foremost is the public interest."

Element Of Whipping In Rape Cases

Quite apart from terms of imprisonment as stipulated under s. 376 of the Penal Code, the other element in the penalty provision is that of whipping. The words employed are "and shall also be liable to whipping". Applying the natural and ordinary meaning of these words. I am of the view that besides imposing imprisonment sentence, the learned judge is required by the said provision to impose whipping on to the accused. There is a long line of authorities to say that the existence of the word "shall" denotes a mandatory requirement. In this regard, what was required was that the accused be sentenced to a term of imprisonment of not less than five years but not more than twenty years AND the accused shall also be liable for whipping.

In this regard, it appears that the learned Sessions Court Judge overlooked this mandatory requirement. It was not revealed in the judgment of the learned judge the reason why the mandatory whipping was not imposed onto the accused.

It could be seen therefore that the learned Sessions Court Judge erred in applying the correct principles of sentencing in this instant case. As such, I am satisfied that the learned judge appeared to be embarking on an extraneous exercise of discretion as envisaged in the decision of the Federal Court in *Bhanudulananda Jayatilake v. PP* [1982] 1 MLJ 83 at p. 84A-B.

Considering public interest as outlined earlier, coupled with the need to reflect the gravity of the crime and the background and antecedents of the accused in this instant case, I feel that the five-year sentence would not be appropriate.

There should be a 'turning of tide' in favour of appropriate sentence for rape cases to reflect the abhorrence of society against rapists. This court takes judicial notice of the frequent reports in the national and local newspapers of incidents of rape. Sometimes these can be brutal and have understandably triggered an outpouring of rage with mounting public pressure to come down hard on rapists. Let the message be heard, loud and clear, that in this court there is a zero tolerance of rape. No one who has committed an offence of rape can expect, upon conviction, to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be

sentenced or punished with the maximum allowed by the law. The maximum sentence for this offence is not more than 20 years imprisonment and shall also be liable to whipping.

Having regard to the antecedents of the accused and taking in totality his plea of guilt, his age, it is my considered view that a sentence of fifteen years imprisonment and five strokes of 'rotan' will be appropriate. The sentence of the learned Sessions Court Judge is accordingly substituted.